To: Goo, Michael[Goo.Michael@epa.gov]
From: michael Goo
Sent: Mon 8/19/2013 6:17:44 PM
Subject: Fw: Memo
111d Memo 5.30.doc

----- Forwarded Message -----
From: John Coequyt <John.Coequyt@sierraclub.org>
To: michael Goo Ex. 6 - Personal Privacy
Sent: Tuesday, May 31, 2011 2:33 PM
Subject: Memo

Michael:

First, you might want to change your personal email address, now that you have new job and all.

Attached is a memo I didn't want to send in public.

Standards of Performance for Existing Sources

Issue: Must a standard of performance under Clean Air Act section 111(d) be achievable by every source in a given category?

Analysis:

The definition of a "standard of performance" in section 111(a)(1) requires that the standard be "achievable" based on the best "demonstrated" "systems of emission reduction." It provides:

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

This definition applies to standards for both new and existing sources. *See* 111(b)(1)(B), 111(d)(1). The statute does not define "achievable," nor does it state that every existing source in the category must be able to achieve the standard. The term "achievable" is ambiguous and EPA therefore has discretion to adopt its own reasonable interpretation.

The case law makes it clear that when establishing performance standards under section 111 for a given source category, EPA need not set standards that are achievable by every existing source in that category. Performance standards can be technology-forcing:

> Recognizing that the Clean Air Act is a technology-forcing statute, we believe EPA does have authority to hold the industry to a standard of improved design and operational advances, so long as there is substantial evidence that such improvements are feasible and will produce the improved performance necessary to meet the standard.

Sierra Club .v Costle, 657 F.2d 298, 364 (D.C. Cir. 1981)(footnote omitted). In fact, for new sources, the D.C. Circuit has held that the standard need not be achievable by *any* existing source. It can go beyond the current state of the art as long as it is a reasonable projection of what will be achievable based on existing technology. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973). The court held:

> We begin by rejecting the suggestion of the cement manufacturers that the Act's requirement that emission limitations be "adequately demonstrated" necessarily implies that any cement plant now in existence be able to meet the proposed standards. Section 111 looks toward what

> may fairly be projected for the regulated future, rather than the state of the art at present, since it is addressed to standards for new plants-old stationary source pollution being controlled through other regulatory authority.

Id. The court's reasoning distinguishes new and old sources, relying on section 111's focus on new sources for its conclusion that existing sources do not necessarily need to be able to meet the standard.

For existing sources, unlike new sources, it obviously would not be a reasonable interpretation of the statute for EPA to set a standard that no existing plant can achieve. But EPA does have discretion to set a standard under 111(d) that (1) no existing plant is currently achieving, and (2) not every existing plant is capable of achieving. That discretion arises from the ambiguity of the "standard of performance" definition and the language of section 111(d).

Section 111(d) contemplates that the states will implement performance standards for existing sources, and that "[r]egulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." The statute does not define "remaining useful life," so EPA has discretion to adopt a reasonable definition. That definition need not be based solely on age; it can also consider factors such as efficiency, capacity factor, investment in pollution controls, etc.

By allowing consideration of the remaining useful life of the existing source, the statute anticipates that some sources will not ultimately meet the standard before they reach the end of their remaining useful life and shut down. EPA has already interpreted 111(d) to authorize states to establish compliance schedules for sources to achieve the standard. 40 CFR 60.24. If states are to phase in compliance for particular sources on a schedule that takes into consideration their remaining useful life "among other factors," it is a simple matter – and perfectly acceptable under the statute – to allow plants nearing the end of their remaining useful life to operate without achieving the standard and then require them to shut down at the end of that remaining useful life. EPA has already acknowledged this concept in applying the "remaining useful life" provision in the regional haze context. *See* 40 CFR pt. 51, App. Y, IV.D.STEP 4.k.2(2) (if decision by the facility to shut down affects the BART determination "this date should be assured by a federally- or State-enforceable restriction preventing further operation"); *see also* 42 U.S.C. §7491(g)(2) (statutory BART factors include "remaining useful life of the source"). EPA can therefore establish a performance standard for existing plants that is not achievable by any plant nearing the end of its "remaining useful life" as defined by EPA.

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